Khalid bin Abd Samad v Dato Seri Tajuddin Abdul Rahman and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(W)-1754–09 OF 2022 AND W-02(W)-1795–09 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
19 OCTOBER 2023

Civil Procedure — Costs — Successful party deprived of costs — Defamation suit — High Court dismissed plaintiff's defamation suit against defendants — High Court decided not to award costs to defendants premised on reason that plaintiff's defamation suit was public interest suit — Whether High Court judge erred in law and misdirected herself in refusing to award costs to successful party — Courts of Judicature Act 1964 s 68(1)(c) — Rules of Court 2012 O 59 rr 2, 3 & 8

Dato' Seri Tajuddin Abdul Rahman ('the plaintiff') had filed a defamation action against Khalid bin Abd Samad ('D1'), New Straits Times Bhd ('D2') and KINITV Sdn Bhd ('D3') in relation to words uttered by D1 against the plaintiff. At the end of the trial, the High Court dismissed the plaintiff's action. The court concluded that although the suit for defamation involved the plaintiff's private interest, the action was nevertheless a 'public interest' suit because the plaintiff and D1 were both Members of Parliament at the material time and the impugned words were uttered in the lobby of the House of Parliament. Consequently, the High Court judge departed from the general rule (per O 59 r 3 of the Rules of Court 2012 ('the ROC 2012')) that 'costs will follow the event' and invoked O 59 rr 2 and 8 of the ROC 2012, and declined to award costs in favour of the successful defendants. The present appeals ('Appeal 1754' and 'Appeal 1795') were filed by D1 and D3 against the decision of the High Court judge in refusing to order any costs to them although they were the successful parties in the defamation suit. It ought to be noted that D1 and D3 had already obtained the leave of the Court of Appeal pursuant to s 68(1)(c) of the Courts of Judicature Act 1964 to file these appeals. The only issue that arose in the present appeals was whether the High Court judge had erred in law and misdirected herself in refusing to award costs to D1 and D3, who were the successful parties in the defamation suit.

Held, allowing Appeal 1754 and Appeal 1795, setting aside the High Court's order to the extent that costs were not awarded, and ordering the plaintiff to pay costs of RM60,000 for each appeal, as costs here and below (inclusive of the costs of the leave application) subject to allocator:

(1) It was trite that costs were at the discretion of the court. Thus, where a court of first instance properly exercised its discretion and decided to award, or not to award costs, then an appellate court would not usually interfere with the court's exercise of its discretion. However, that was not to say that the court's decision on costs was always immune from appellate interference. Indeed, in certain well-defined circumstances, an appellate court would interfere. In this respect, Malaysia Civil Procedure (2021) (Vol 1) at p 855 stated that successful party was always entitled to costs except where it was shown that the successful party had misconducted himself or was negligent or guilty of material omission. These grounds or factors were not exhaustive and were just some of the examples of possible situations where costs may not be awarded to a successful party (see paras 19 & 21).

(2) On the issue of public interest litigation, clearly, the plaintiff's claim, being one which was for defamation, had no public interest element in it, and it was not filed to promote any public interest. Rather, it was filed to vindicate the plaintiff's own private and personal reputation. The fact that the public may be interested in the case did not convert the defamation action into public interest litigation. In the result, the court did not see how the definition of public interest litigation (per the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164) would apply in the present case. Further, the counsel for the plaintiff had very properly conceded that this was a private action and not a public interest litigation. Thus, it was apparent that the High Court judge had erroneously described the plaintiff's defamation action as a public interest suit (see paras 22–23).

(3) The parties were not given the opportunity to submit on the issue of public interest, and as to why costs should, or should not be awarded. There was nothing in the High Court's grounds of judgment to indicate that D1 and D3 had conducted themselves in such a manner during the proceedings in the High Court as could justify them being deprived of costs, albeit, that they were the successful parties. Thus, as a matter of principle, D1 and D3, as successful parties, were entitled to costs in the usual manner and more so since it took five years for the defamation suit to reach finality in the High Court. In the circumstances of the case, it was plainly and patently wrong for the High Court judge to have: (a) labelled the defamation suit as a pubic interest action; and (b) deprived D1 and D3 of their entitlement to costs (see paras 25–27).

[Bahasa Malaysia summary

Dato' Seri Tajuddin Abdul Rahman ('plaintif') telah memfailkan tindakan fitnah terhadap Khalid bin Abd Samad ('D1'), New Straits Times Bhd ('D2') dan KINITV Sdn Bhd ('D3') berhubung perkataan yang diucapkan oleh D1 terhadap plaintif. Pada akhir perbicaraan, Mahkamah Tinggi menolak

tindakan plaintif. Mahkamah membuat kesimpulan bahawa walaupun saman fitnah tersebut melibatkan kepentingan persendirian plaintif, tindakan tersebut adalah saman 'kepentingan awam' kerana kedua-dua plaintif dan D1 adalah ahli Parlimen pada masa yang material dan perkataan tersebut telah dilontarkan di lobi Bangunan Parlimen. Akibatnya, hakim Mahkamah Tinggi meninggalkan peraturan am (berdasarkan A 59 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012')) bahawa 'kos itu mengikut keadaan' dan mengguna pakai A 59 kk 2 dan 8 KKM 2012, dan enggan memberikan kos yang memihak kepada defendan-defendan yang berjaya. Rayuan-rayuan semasa ('Rayuan 1754' dan 'Rayuan 1795') telah difailkan oleh D1 dan D3 terhadap keputusan hakim Mahkamah Tinggi yang enggan memerintahkan apa-apa kos kepada mereka walaupun mereka adalah pihak yang berjaya dalam saman fitnah tersebut. Perlu diingat bahawa D1 dan D3 telah pun mendapat kebenaran Mahkamah Rayuan menurut s 68(1)(c) Akta Mahkamah Kehakiman 1964 untuk memfailkan rayuan-rayuan ini. Satu-satunya isu yang timbul dalam rayuan ini ialah sama ada hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan salah arah dirinya apabila enggan memberikan kos kepada D1 dan D3, yang merupakan pihak yang berjaya dalam saman fitnah tersebut.

Diputuskan, membenarkan Rayuan 1754 dan Rayuan 1795, mengenepikan perintah Mahkamah Tinggi setakat kos tidak diberikan, dan memerintahkan plaintif membayar kos RM60,000 bagi setiap rayuan, sebagai kos di sini dan di bawah (termasuk kos permohonan kebenaran) tertakluk kepada alokator:

(1) Sudah menjadi undang-undang yang mantap bahawa kos adalah mengikut budi bicara mahkamah. Oleh itu, apabila mahkamah perbicaraan menggunakan budi bicaranya dengan betul dan memutuskan untuk mengawardkan, atau tidak mengawardkan kos, maka mahkamah rayuan biasanya tidak akan mengganggu perlaksanaan budi bicara mahkamah tersebut. Walau bagaimanapun, itu tidak bermakna bahawa keputusan mahkamah mengenai kos sentiasa kebal daripada campur tangan rayuan. Malah, dalam keadaan tertentu yang jelas, mahkamah rayuan akan campur tangan. Dalam hal ini, *Malaysia Civil Procedure* (2021) (Jld 1) di muka surat 855 menyatakan bahawa pihak yang berjaya sentiasa berhak mendapat kos kecuali apabila ditunjukkan bahawa pihak yang berjaya telah salah laku dirinya atau cuai atau bersalah kerana peninggalan material. Alasan atau faktor ini tidak menyeluruh dan hanyalah sebahagian daripada contoh situasi yang memungkinkan kos tidak diberikan kepada pihak yang berjaya (lihat perenggan 19 & 21).

(2) Mengenai isu litigasi kepentingan awam, jelas sekali, tuntutan plaintif, sebagai tuntutan fitnah, tidak mempunyai unsur kepentingan awam di dalamnya, dan ia tidak difailkan untuk mempromosikan apa-apa kepentingan awam. Sebaliknya, ia difailkan untuk membuktikan

reputasi persendirian dan peribadi plaintif sendiri. Hakikat bahawa orang awam mungkin berminat dalam kes tersebut tidak menukar tindakan fitnah kepada litigasi kepentingan awam. Hasilnya, mahkamah tidak melihat bagaimana definisi litigasi kepentingan awam (mengikut kes *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164) terpakai dalam kes ini. Tambahan pula, peguam bela plaintif telah mengakui bahawa ini adalah tindakan persendirian dan bukan litigasi kepentingan awam. Oleh itu, adalah jelas bahawa hakim Mahkamah Tinggi telah terkhilaf apabila menyifatkan tindakan fitnah plaintif sebagai saman kepentingan awam (lihat perenggan 22–23).

(3) Pihak-pihak tidak diberi peluang untuk menghujahkan isu kepentingan awam, dan mengapa kos harus, atau tidak harus diberikan. Tiada apa-apa dalam alasan penghakiman Mahkamah Tinggi yang menunjukkan bahawa D1 dan D3 telah berkelakuan semasa prosiding di Mahkamah Tinggi dengan kelakuan yang mewajarkan mereka dilucutkan kos, walaupun, mereka adalah pihak yang berjaya. Oleh itu, pada prinsipnya, D1 dan D3, sebagai pihak yang berjaya, berhak menerima kos seperti biasa dan lebih-lebih lagi kerana ia mengambil masa lima tahun untuk saman fitnah tersebut dimuktamadkan di Mahkamah Tinggi. Dalam keadaan kes, adalah secara jelas dan nyata salah bagi hakim Mahkamah Tinggi untuk: (a) melabelkan saman fitnah tersebut sebagai tindakan kepentingan awam; dan (b) melucutkan D1 dan D3 daripada kelayakan mereka untuk menerima kos (lihat perenggan 25–27).]

Cases referred to

Dato Seri Tajuddin Abdul Rahman lwn Khalid bin Abd Samad dan lain-lain [2023] 7 MLJ 617; [2023] 1 CLJ 620, HC (refd)

Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 3 AMR 320; [2006] 2 CLJ 532, CA (refd)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1997] 2 CLJ 607, CA (refd)

Transmile Group Bhd & Anor v Malaysian Trustees Bhd & Ors [2013] 9 MLJ 43, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(c)

Rules of Court 2012 O 59, O 59 rr 2, 3, 8

Appeal from: *Dato Seri Tajuddin Abdul Rahman lwn Khalid bin Abd Samad dan lain-lain* [2023] 7 MLJ 617 (High Court, Kuala Lumpur)

S Sankaran Nair (SN Nair & Partners) in Civil Appeal No W-02(W)-1754–09 of 2022 for the appellant.

K Shanmuga (Kanesalingam & Co) in Civil Appeal No W-02(W)-1795–09 of 2022 for the appellant.

Hasnal Rezua Merican bin Habib Merican (with Muzzammil Merican bin Hasnal Rezua Merican) (The Chambers of Kamarul Hisham & Hasnal Rezua) in Civil Appeal Nos W-02(W)-1754–09 of 2022 and W-02(W)-1795–09 of 2022 for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] At the conclusion of a full trial in the High Court the plaintiff's defamation action against the defendants was dismissed. The learned judge of the High Court ('the judge') came to her own conclusion that although the suit for defamation involved the plaintiff's private interest, the action was nevertheless a 'public interest' suit. The judge came to this conclusion apparently because the plaintiff and the first defendant were both Members of Parliament at the material time and the impugned words were uttered in the lobby of the House of Parliament. Consequently, the judge departed from the general rule (per O 59 r 3 of the Rules of Court 2012) that 'costs will follow the event', and invoked O 59 rr 2 and 8 of the Rules of Court 2012, and declined to award costs in favour of the successful defendants.

[2] It is necessary to mention at the outset that these points were not argued during the proceedings before the High Court. The issue of the defamation action being a public interest suit did not even arise during the proceedings and at the end of the trial, counsel had in fact submitted that their respective clients are entitled to substantial costs.

THE APPEALS

[3] There are two appeals before us, namely, Civil Appeal No W-02(W)-1754–09 of 2022 ('Appeal 1754') and Civil Appeal No W-02(W)-1795–09 of 2022 ('Appeal 1795'). Both appeals shall be referred to collectively as 'the appeals'. The appeals emanated from the High Court's decision (after trial) dated 22 February 2022 in Kuala Lumpur High Court Suit No WA-23CY-8–02 of 2017 ('the defamation suit'). The defamation suit was filed on 22 February 2017. The plaintiff in the defamation suit (respondent in the appeals) is Dato' Seri Tajuddin Abdul Rahman. The appellant in Appeal 1754 is Khalid bin Abd Samad (first defendant in the defamation suit). The appellant in Appeal 1795 is KINITV Sdn Bhd (third defendant in the defamation suit). The second defendant is New Straits Times Bhd ('NST'). For convenience, we shall refer to the respondent in the appeals as 'the plaintiff',

and the appellants in Appeal 1754 and Appeal 1795 as the first defendant ('D1'), and the third defendant ('D3'), respectively. The decision of the High Court is reported as *Dato Seri Tajuddin Abdul Rahman lwn Khalid bin Abd Samad dan lain-lain* [2023] 7 MLJ 617; [2023] 1 CLJ 620 (HC).

[4] The trial was conducted non-consecutively over several days between 2019 and 2022. In fairness to the parties and the judge, the delay in the disposal of the trial was due to the COVID-19 pandemic and the attendant Movement Control Orders etc that were imposed on the public. At any rate, the plaintiff testified on his own behalf and was the sole witness. D1 testified together with eight other witnesses who were called to testify on his behalf. D2 called one witness. D3 called one witness.

[5] At the end of the trial, the judge dismissed the plaintiff's claim but made no order as to costs. The plaintiff did not appeal against the judge's decision to dismiss the defamation suit. However, D1 and D3 are aggrieved by the High Court's decision not to order any costs to them, albeit, that they had successfully defended the case. As the matter only related to the issue of costs, leave of the Court of Appeal was required pursuant to s 68(1)(c) of the Courts of Judicature Act 1964.

[6] D1 and D3 duly obtained leave of the Court of Appeal on 7 September 2022 per Mahkamah Rayuan Notis Usul No W-08–88–03 Tahun 2022 and Mahkamah Rayuan Notis Usul No W-08–89–03 Tahun 2022 respectively. NST did not apply for leave and did not lodge any appeal against the High Court's refusal to award any costs.

[7] Thus, the only issue in the appeals is whether the judge had erred in law and misdirected herself in refusing to award costs to D1 and D3, who were the successful parties in the defamation suit.

BACKGROUND

[8] At all material times, the plaintiff and D1 were Members of Parliament. D3 is an internet news portal. During a Parliamentary proceeding in the Dewan Rakyat which was held on 21 November 2016, the plaintiff uttered some sexist, immoral and unparliamentary statements, which was directed at the Member of Parliament for Seputeh, the Hon Mdm Teresa Kok Suh Sim ('MP for Seputeh').

[9] For purposes of the present appeal, we find it unnecessary to repeat here the plaintiff's vile utterances which were targeted at the MP for Seputeh. D1 was provoked by the plaintiff's sexist remarks. D1 responded by using a swear or curse word to castigate the plaintiff for what he had said about the MP for

Seputeh. The plaintiff challenged D1 to repeat it outside Parliament. D1 did so accordingly and thereafter issued a media statement at the lobby of the House of Parliament wherein he repeated the swear or curse word.

[10] D1's statement was published by D2 and D3. The plaintiff sued the defendants for defamation. In dismissing the plaintiff's defamation suit, the judge opined that it was the plaintiff who, by his unsavoury utterances, had instigated the whole incident. The judge found that by uttering the sexist remarks and directing it at the MP for Seputeh, the plaintiff had intentionally provoked other Members of Parliament and this had resulted in D1 uttering the impugned statements.

[11] The judge was of the view that the plaintiff's act was disgraceful and unparliamentary, particularly since the whole incident took place in the Parliament during a Parliamentary proceeding. The judge noted that the plaintiff had no decency to apologise and did not show any remorse for making those vile statements against a fellow Member of Parliament. The High Court held that D1's statements were not defamatory and that D1 had proven the defences of justification, fair comment and qualified privilege.

[12] In so far as D3 was concerned, the High Court held that they published a bona fide report on a matter of public interest and that the publication was fair and accurate. However, the judge went on to hold that this was a public interest case and exercised her discretion under O 59 rr 2 and 8 of the Rules of Court 2012 and made no order as to costs.

COSTS — ORDER 59 OF THE RULES OF COURT 2012

[13] The following provisions in O 59 of the Rules of Court 2012 are relevant and pertinent to the present issue at hand. They are:

Order 59 r 2

(1) Where by virtue of any written law the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any written law, not being proceedings in the High Court, are to be determined in the High Court, rule 6(6) and rule 13, shall have effect in relation to proceedings for determination of those costs as they have effect in relation to proceedings for determination of the costs of or arising out of proceedings in the High Court.

(2) Subject to the express provisions of any written law and of these Rules, *the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid*.

Order 59 r 3

3 When costs to follow the event (O 59 r 3)

(1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.

(2) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*

Order 59 r 8

8 *Special matters to be taken into account in exercising discretion (O 59 r 8)*

The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —

(a) any offer of contribution or offer of settlement under Order 22B;

(b) *the conduct of all the parties, including conduct before and during the proceedings*;

(c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and

(d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar. (Emphasis added.)

COSTS — JURISPRUDENCE

[14] The principles that are germane to the exercise of the court's discretion to award (or not to award) costs are quite well settled. The principles in this regard have been distilled and lucidly stated in the following cases. We will start by referring to the case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 at p 327; [1997] 2 CLJ 607 where the Court of Appeal said:

> The power to award costs is no doubt discretionary. But like other discretionary powers vested in a court, it must be exercised judicially. The general rule is that a successful litigant must have all his costs unless he has done something or omitted to do something in the conduct of the action by reason of which he should be deprived of his costs, either altogether or partly. A judge when departing from the general rule must give reasons. No reasons have been given by the judge for not adhering to the general rule. This is, therefore, a case in which this court is entitled to exercise its original discretion. The respondents will therefore have the costs of the action as well.

[15] The principles in regards to the issue of costs were also neatly summarised by the Hon Justice Nallini Pathmanathan (now FCJ) in *Transmile*

Group Bhd & Anor v Malaysian Trustees Bhd & Ors [2013] 9 MLJ 43 (HC) where Her Ladyship said:

> [7] Under the Rules of Court 2012, the general principle that costs follow the event remains (see O 59 r 3 of the Rules of Court 2012). Order 59 r 2 provides that subject to express provisions of written law and the Rules, the costs of and incidental to proceedings in the court shall be in the discretion of the court which shall have full power to determine by whom and to what extent the costs are to be paid.
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> [8] Order 59 r 3(2) stipulates that the court has in the exercise of its discretion in awarding costs shall generally order costs to follow the event except when it appears to the court that the circumstances of the case warrant the making of some other order in respect of the whole of, or a part of the costs. The court therefore has to exercise its discretion judicially in determining whether costs follow the event or whether there should be a departure from the general position.
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> [9] The court is entitled under O 59 r 8 to take into account 'special matters' as specified therein and one of which is the conduct of parties including before and during proceedings. This includes, as submitted by learned counsel for the second to 13th respondents, the manner in which a party has pursued his case or a particular issue, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and whether the parties attempted to resolve the matter.

[16] The next case is *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 (SC) where the Supreme Court said:

> In our law the discretion of the court in matter of costs is clearly spelt out. In the Courts of Judicature Act 1964 s 68(1)(c) puts in no uncertain terms that no appeal should be brought to the Supreme Court where the judgment or order relates to costs only, 'which by law are left to the discretion of the Court,' except with the leave of the Supreme Court or the judge concerned. Order 59 r 3(2) of the Rules of the High Court 1980 provides as follows:
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> > If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.
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> This provision is identical to the English O 62 rule 3 (see *Supreme Court Practice* 1979 Volume 1 p 959).
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> The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs *except when it appears to the Court that in the circumstances of the case some other order should be made.* The same principle was enunciated in greater detail by Parker LJ in *Ottway v Jones* [1955] 2 All ER 585, 591:
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> > One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected

A with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the sucessful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right.

B Because costs is in the discretion of the court there has been a rule of practice of the House of Lords as stated by Viscount Cave LC in *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 that no appeal would lie for costs only but the House will however entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law.

C To summarise, an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

D The main thrust of the argument of the appellants would seem to be that there was a total failure on the part of the respondent to establish his title and therefore it would be impossible for the court to order costs against the appellants. This argument does not however give a correct picture of the situation before the learned judge. The respondent was an account holder with the bank and he thought he had E sufficient interest to come to the court and apply for the declarations. What actually happened was not that there was a failure on his part to establish his title but that the government had successfully taken a Bill through Parliament which altered the very basis on which he relied for his application for the declarations.

It was said by counsel for the first appellant that the learned judge had made the F remark 'this is not cricket' during the argument before him. We feel that the remark if made would be hardly surprising. The circumstances were materials available to the learned judge. Thus as an appellate court we are unable to say that the learned judge had under the circumstances exercised his discretion wrongly. Lord Halsbury in *Civil Service Cooperative Society v General Steam Navigation Co* [1903] 2 KB 756 765 said:

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> No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.

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The White Book says at p 938:

> On an appeal as to costs where the costs are in the discretion of the judge the C.A. will assume that he exercised his discretion unless satisfied that he did not do so (*Re Rotch* (1909) 54 SJ 30). A fortiori it will not interfere where he assigns I reasons therefor which are perfectly germane and not based on any false principle (*Lever Bros v Masboro' Equitable etc Society* (1912) 28 TLR 294); nor where there are also other possible grounds for his discretion (*Societe des Hotels Reunis v Hawker* (1914) 30 TLR 423 CA).

Wee Chong Jin CJ in *KE Hilborne v Tan Tiang Quee* [1972] 2 MLJ 94 99 said:

> It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles. It has also long been well settled that in the exercise of its discretion a court may, if in its opinion there are grounds for it to do so, refuse to award costs to a party who establishes that he has a good cause of action.

PUBLIC INTEREST LITIGATION

[17] As stated earlier, the judge declined to award costs to the successful parties because she came to her own conclusion that the defamation suit was a public interest suit. Thus, it becomes necessary for us to refer to the Court of Appeal's decision in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 3 AMR 320; [2006] 2 CLJ 532 (CA) ('QSR') where the term 'public interest litigation' was explained. This is what was said by the Court of Appeal:

> [17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as de minimis. In the middle of the spectrum are cases which are in the nature of a public interest litigation. *The test for determining whether an application is a public interest litigation* is that laid down by the *Supreme Court of India in Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:
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> > [P]ublic interest litigation is usually entertained by a court for the purpose of *redressing public injury, enforcing public duty, protecting social rights and vindicating public interest.* The real purpose of entertaining such application is the *vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual.*
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> But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated. (Emphasis added.)

HIGH COURT — DECISION

[18] The judge's reasons for dismissing the defamation suit and making no order as to costs may be gleaned from the following paragraphs of the grounds of judgment which read as:

> KEPUTUSAN MAHKAMAH
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> [55] Mengambil kira perkara-perkara di hadapan saya semasa perbicaraan dijalankan. Mahkamah berpuas hati bahawa kenyataan-kenyataan yang dibuat oleh

defendan pertama tidak bersifat fitnah. Ianya dibuat dengan justifikasi, fair comment dan perlindungan bersyarat. Defendan kedua dan defendan ketiga telah membuat terbitan dengan *bona fide* tentang perkara kepentingan awam dan terbitan yang dibuat adalah adil, saksama dan tepat. Oleh itu, tuntutan plaintif terhadap kesemua defendan adalah ditolak, dan mengambil kira kepentingan awam tiada kos diberikan.

[56] Mengambil kira status yang dihormati yang dipegang oleh plaintif iaitu sebagai seorang Ahli Parlimen dan Timbalan Menteri Pertanian dan Industri Asas Tani dan defendan sebagai Ahli Parlimen Shah Alam dan Ahli Politik Pembangkang yang dikenali sebagai Parti Amanah Negara, mahkamah berpendapat bahawa *walaupun isu ini nampak melibatkan individu tetapi mengambil kira tempat kejadian dan latar belakang pihak-pihak isu ini telah menjadi isu public interest yang disiarkan dalam media sosial dan menjadi perbincangan oleh masyarakat awam untuk sekian lama.*

[57] Dalam kes ini mahkamah merujuk A 59 k 8(b) Kaedah-Kaedah Mahkamah 2012 iaitu kelakuan semua pihak-pihak, termasuk kelakuan sebelum dan semasa prosiding yang diambil kira dalam menjalankan budibicara untuk mengawad kos.

[58] Oleh itu, mahkamah dibawah A 59 k 2 Kaedah-Kaedah Mahkamah 2012 menggunakan budi bicara tidak mengawardkan kos kepada kesemua defendan-defendan walaupun tuntutan plaintif ditolak. (Emphasis added.)

OUR DECISION

[19] It is trite that costs is at the discretion of the court. Thus, where a court of first instance properly exercises its discretion and decides to award, or not to award costs, then an appellate court will not usually interfere with the court's exercise of its discretion. But, that is not to say that the court's decision on costs is always immune from appellate interference. Indeed, in certain well defined circumstances, an appellate court will interfere. In this regard, the following passage at para 59/2/6 of the Malaysia Civil Procedure (2021) (Vol 1) (at p 854) ('White Book') states the principle vis a vis appellate interference as follows:

> An appellate court will interfere with a judge's exercise of discretion on costs where there has been an error of law or principle; for example taking into account irrelevant matters; or omitting to take into account relevant matters; or the decision is plainly wrong and must therefore have been reached by a wrong assessment of the factors that had to be taken into account or exercising its discretion based on wrong principles of law ...

[20] And further, at p 855 (para 59/3/3) the *White Book* makes reference to O 59 r 3 of the Rules of Court 2012 and states that:

> ... If a successful party misconducts himself, or has been negligent, or guilty of material omission.
>
> ...

> The general principle envisaged by the rule is that costs follow the event. They should therefore be awarded to a successful party, unless there are special reasons for depriving him of his costs ...

[21] In the same passage, the *White Book* emphasises that a successful party is *always* entitled to costs except where it is shown that the successful party had misconducted himself or was negligent or guilty of material omission. These grounds or factors are not exhaustive and are just some of the examples of possible situations where costs may not be awarded to a successful party.

[22] On the issue of public interest litigation, clearly, the plaintiff's claim, being one which is for defamation has no public interest element in it, and it was not filed to promote any public interest. Rather, it was filed to vindicate the plaintiff's own private and personal reputation. The defamation suit had nothing do with public interest, albeit that the public may be interested in the case. But that does not convert the defamation action into a public interest litigation. In the result, we do not see how the definition of public interest litigation (per the case of QSR) would apply here.

[23] For the record, counsel for the plaintiff has very properly conceded that this was a private action and not a public interest litigation. Thus, it is apparent that the judge had erroneously described the plaintiff's defamation action as a public interest suit.

[24] For completeness, it is relevant to note the position that was taken by the parties in the High Court in relation to costs. The minutes of the court's proceedings for 26 October 2021, show that the parties had asked for costs as follows:

> Plf — Pohon kos RM30,000.00–50,000.00 untuk setiap Defendan.
>
> D1 — Pohon kos RM50,000.00.
>
> D2 — Pohon kos RM50,000.00.
>
> D3 — Pohon kos RM50,000.00.

[25] Before us, counsel for the plaintiff and for D1 (and D3) confirmed the accuracy of the said minutes. In the circumstances, it is quite clear to us that in all the circumstances of this case, it was plainly and patently wrong for the judge to have: (a) labelled the defamation suit as a public interest action; and (b) to have deprived D1 and D3 from their entitlement to costs when there were no vitiating circumstances or grounds to disentitle them from costs.

[26] Indeed, since the parties, including the plaintiff had asked the judge to order substantial costs in favour of their respective clients, we find it odd that the judge had taken it upon herself to deprive D1 and D3 *qua* successful

parties, from being awarded substantial costs. And this was done without the parties being given an opportunity to submit on the issue of public interest, and as to why costs should, or should not be awarded.

[27] At any rate, there is nothing in the High Court's grounds of judgment to indicate that D1 and D3 had conducted themselves in such a manner during the proceedings in the High Court as could justify them being deprived of costs, albeit, that they were the successful parties. Thus, as a matter of principle, D1 and D3, as successful parties are entitled to costs in the usual manner and more so since it took five years for the defamation suit to reach finality in the High Court.

OUTCOME

[28] For the reasons stated and discussed as above, we are satisfied that there was a misdirection which warranted appellate interference and the judge was plainly wrong in not granting costs of the action to D1 and D3. Thus, we allowed Appeal 1754 and Appeal 1795.

[29] The order of the High Court to the extent that costs were not awarded, is set aside. We order the respondent to pay costs of *RM60,000 for each appeal*, as costs here and below (inclusive of the costs of the leave application). The orders of costs are subject to allocator.

Order accordingly.

Reported by Dzulqarnain Ab Fatar